Supreme Court of the United States.

OCTOBER TERM, 1908.

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IN THE MATTER

OF

The Application of MARY HATCH RIGGS, as Administratrix of the Goods, Chattels and Credits of Clarence B. Riggs, deceased, in behalf of herself and all others similarly situated, for a Writ of Mandamus against the Honorables George C. Holt and Charles M. Hough, Judges of the District Court of the United States for the Southern District of New York, and against the District Court of the United States for the Southern District of New York.

BRIEF FOR RESPONDENTS.

CHARLES K. BEEKMAN,
Counsel for Respondents.

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BRIEF FOR RESPONDENTS GEORGE C. HOLT AND CHARLES M. HOUGH, JUDGES OF THE UNITED STATES DISTRICT COURT, IN AND FOR THE SOUTHERN DISTRICT OF NEW YORK, IN OPPOSITION TO APPLICATION FOR WRIT OF MANDAMUS OR PROHIBITION.

STATEMENT OF FACTS.

This matter comes before this Court on an application by Mary Hatch Riggs, as administratrix of

Clarence B. Riggs, deceased, for a writ of mandamus, directed to the respondents and the District Court of which they are Judges, commanding the respondents and that Court to dismiss the petition in bankruptcy, heretofore filed against the New York Tunnel Company, and all proceedings therein, and to vacate the order of adjudication in bankruptcy, also the orders appointing and discharging the Receiver and appointing a Trustee, and further commanding them to desist from exercising any further jurisdiction, excepting the entry of an order dismissing the said petition and the said proceedings; or, in the alternative, that a writ of mandamus commanding them to reopen the alleged adjudication in bankruptcy and allow your petitioner or any party in interest to appear and be heard in opposition to said petition, and the adjudication thereon; or, in the alternative, that a writ of prohibition issue restraining the respondents and the District Court from taking any further proceedings in the matter of the New York Tunnel Company.

The history of this litigation is briefly summarized in the return filed by the respondents, but counsel wish at the outset to call the attention of this Court to what they deem to be the facts particularly vital to the motion now before the Court.

The petition in bankruptcy upon which an adjudication was had, and which is now sought to be set aside, was filed by three creditors on the 27th day of May, 1907, and upon the consent of the bankrupt an adjudication in bankruptcy was thereafter made on the 29th day of May in the same year (Return, fols. 34 to 39, pp. 12-13). At the time of the filing of the petition, the New York Tunnel Company, a New York corporation, was engaged in constructing a tunnel connecting the Borough of Manhattan and the Borough of Brooklyn, in the City of New York, under the bed of the East River.

This tunnel consisted of a steel tube, as it were, and its construction is more specifically described in the affidavit of David L. Hough, which appears at page 75 of the return. After the adjudication was made, and on or about the 17th day of June, 1907, D. Allens Sons Rope Company, one of the contract creditors of the bankrupt, who, was alleged to have a provable claim in bankruptcy, made a motion to set aside the adjudication, and on this motion this creditor was represented by Benjamin S. Catchings, who is the counsel for the petitioner on the motion now before this Court (Return, fols. 179-183, pp. 60-61). This motion was adjourned from time to time, it being understood that such adjournments were had without prejudice to the right of the creditor mentioned to raise the question of jurisdiction of the District Court to make the adjudication which had been made. Before this motion was argued or decided, D. Allens Sons Rope Company, the creditor mentioned, sold their claim and ceased to have any further interest in the bankruptcy proceedings (Return, fols. 169 and 345). Meanwhile, and before D. Allens Sons Rope Company had made the said motion or sold their claim, upon a petition by the Receiver in bankruptcy (Return, p. 17), an order was obtained from the respondent George C. Holt on the 31st day of May, 1907, directing the present petitioner, Mary Hatch Riggs, and her attorneys to show cause why they should not be restrained from prosecuting in the Supreme Court of the State of New York an action for recovery of damages for alleged negligence which was claimed to have caused the death of the present petitioner's testator. Upon the return of this order to show cause, the respondent George C. Holt, directed that the action should be permanently stayed, and that Mary Hatch Riggs, the plaintiff in that action, should proceed before Stanley W. Dexter, as Special Master, to determine and liquidate the amount

of her claim, and should then file proof of such claim as so liquidated, with the Referee (Return, fols. 58-63, pp. 20-21). The petitioner Mary Hatch Riggs and her counsel, who were not satisfied with that ruling and order, filed a petition in the United States Circuit Court of Appeals in and for the Second Circuit, to review the order made by respondent George C. Holt, and in the petition to review attacked the jurisdiction of the United States District Court, denying its power to make any order in the bankruptcy proceedings, and maintained that as the Court had no jurisdiction, the Circuit Court of Appeals should set aside the said adjudication, as well as the order which the petitioner was then seeking primarily to review (see Return, pages 32-33, fols. 96-98). In her said petition to review the present petitioner asserted that the District Court erred as a matter of law in directing that the claims arising out of tort and not out of contract should be liquidated and proved in bankruptcy (Return, fol. 96, p. 32), although counsel for the Receiver and the Trustee had not opposed the filing and proving of such tort claims in the bankruptcy proceedings. After argument, the United States Circuit Court of Appeals decided (Return, pp. 44-48) that the present petitioner was not a party to the bankruptcy proceedings, because her claim, being founded in tort, was not provable in bankruptcy, and, therefore, the prosecution of her suit in the State Court could not be restrained. The Circuit Court of Appeals also held that the jurisdiction of the District Court could not be attacked collaterally in the manner attempted, and expressly refused to pass upon that question.

Thereafter, and on the twenty-fifth day of May, 1908, the petitioner Riggs, reduced her claim to judgment in the Supreme Court of the State of New York, judgment being rendered in her favor against the bankrupt for the sum of Thirty-eight

thousand five hundred and eighty-seven and 17/100 dollars (see Petition for Writ, fol. 19, p. 7).

Before the entry of the said judgment by the present petitioner and on the 11th day of May, 1908, a year after the filing of the petition and the adjudication in bankruptcy, the present petitioner, together with certain other tort creditors and one alleged contract creditor, to wit, Borne Scrymser Company, made a motion before the United States District Court before the respondent Charles M. Hough, to set aside the adjudication in bankruptcy, or to allow the moving parties permission to intervene and plead to the petition, alleging that the District Court had no jurisdiction, for the reason that the bankrupt was not such a corporation as could be adjudged a bankrupt within the meaning of the Bankruptcy Act (Return, fols. 151-155, pp. 51-52).

It will be noticed that in the moving papers submitted on this motion (see Return, fol. 321, also pp. 108-109), it appeared that Borne Scrymser Company had submitted to the jurisdiction of the District Court by filing their proof of claim with the Referee, and the other creditors, being so-called tort creditors, had no standing in the bankruptcy proceedings, as the United States Circuit Court of Appeals had decided in the decision just referred to. After argument of this new motion to vacate the adjudication and allow the so-called tort creditors to intervene and plead, the respondent Hough denied the application and handed down a memorandum, a copy of which appears in the Return (p. 115, fols. 344-5). Thereupon the present petitioner took an appeal to and filed a petition for review in the United States Circuit Court of Appeals. That Court, however, affirmed the order of respondent Hough, stating that the jurisdiction of the District Court was not a

nullity, that it could not be questioned except by direct appeal from the adjudication, and that the petitioner, not being a party to the bankruptcy proceedings, could not properly raise the question in the manner attempted.

Upon the entry of a mandate upon this opinion, the present petitioner did not apply for any writ of certiorari, or by any other process attempt to appeal to this Court within the thirty days prescribed by General Order in Bankruptcy No. 36, but went again before the District Court and moved before the respondent George C. Holt, not upon new papers, not upon further affidavits, but upon all the proceedings that had been had and the papers upon which the previous motions had been heard, for a rehearing of her former motion and for leave to renew such motion (Return, pp. 139-140). When this matter came before respondent Holt he referred the motion for rehearing and renewal to the respondent Charles M. Hough, who had made the order from which the last appeal to the United States Circuit Court of Appeals had been taken. Counsel for the present petitioner then addressed a letter to respondent Hough, asking him to refer the matter to respondent Holt (Return, p. 149). Respondent Holt thereupon addressed a letter to the counsel for the petitioner, stating that he deemed it improper for him to rehear the application inasmuch as the original order which had already been reviewed on appeal had been made by the respondent Hough, and a rehearing before respondent Holt, who was associate district Judge of respondent Hough, would be equivalent to an appeal from one District Judge to another (Return, p. 151). The matter was then remitted to the respondent Hough for further proceedings, and as far as the record shows no proceeding was taken by the present petitioner to proceed to argument before the respond-

ent Hough, and the motion for leave to renew and for a rehearing is therefore now in abeyance.

It will thus be seen that this petitioner has sought to raise the question of jurisdiction of the District Court on two distinct motions and appeals from orders entered on such motions; and that she has prosecuted two appeals to the United States Circuit Court of Appeals in which the question of jurisdiction has been incidentally raised in one appeal and directly in the other. After the decision on the first appeal, the petitioner made no effort to review the case in this, the Supreme Court of the United States, and after the second appeal she has not sought to raise the question by a writ of error or a writ of certiorari. At her own request and upon her own petition the Circuit Court has decided that she is not a party to the bankruptcy proceedings, and from this finding she has taken no appeal, although the decision was rendered over a year ago.

As affecting the rights of other creditors, it is important for the Court to consider the status of the bankruptcy proceedings at the present time as compared to their status at the time of the adjudication.

Counsel for the petitioner delayed in making his motion to set aside the adjudication and for leave to intervene until the 11th day of May, 1908.

Between February 28, 1908, the date of the order allowing the petitioner to proceed in the State Court to the liquidation of the claim, and the 11th day of May, 1908, the date of her motion to set aside the adjudication, the bankrupt had been engaged in liquidating other tort claims, and the stockholders of the bankrupt had contributed from their private means funds with which to settle a number of these claims, as appears in the affidavit of the attorney for the bankrupt, at pages 111-115. Claims asserted in the sum of about $70,000 had been settled by comparatively small payments, and

claims asserted in the sum of $50,000 had been settled by confessions of judgment by the bankrupt, aggregating in all about $3,000 (Return, pp. 111 to 115). Proceedings have been instituted for the recovery of the claim of $2,000,000 against the Rapid Transit Subway Construction Company, as appears in the affidavit of D. L. Hough, contained in the Return at folio 244, page 82, and there will in all probability be a profit of $80,000 realized as a result of the administration of the estate by the trustee in bankruptcy. There is nothing, moreover, in the record to show that there will not be funds to meet the claims of the tort creditors, the validity of some of which, it must be remembered, is as yet undetermined.

During the time between the adjudication on May 29, 1907, and May 11, 1908, the Trustee was, moreover, under the positive obligation to administer the estate in bankruptcy to the best of his ability. As is clearly indicated by the affidavits of Wells (Return, pp. 87-88, fols. 259-267), and of Hough (Return, fols. 241-243, p. 81), long before any motion was made attacking the adjudication, it was necessary to decide whether the business of the bankrupt, in constructing the subway tunnel under the East River, under contract with the Rapid Transit Subway Construction Co., should be continued. The situation confronting the Receiver was most serious, not only on account of the claims of creditors of the bankrupt, including these tort creditors, but also with respect to the entire community in the City of New York.

The tunnel being constructed by the bankrupt was to form the connecting link between the subway system in the Borough of Brooklyn, and that in the Borough of Manhattan (Return, fols. 226-228, 255, p. 76 and p. 85). It was of vital importance to the entire community that the tunnel should be completed at the earliest possible moment.

With respect to the interests of creditors of the bankrupt, when the Receiver took charge the situation was most critical. The chief assets of the estate were the plant and machinery of the bankrupt, valued at $87,000.00, and the claim under the contract for constructing the tunnel (Return, fols. 257-8, p. 86). The tunnel was not completed. It was necessary to maintain an abnormal air pressure therein to prevent flooding and consequent loss. Its cost of construction involved millions of dollars. Even to maintain existing conditions and prevent absolute destruction of this great public work required funds for the employment of men and purchase of supplies. It is obvious that if the Receiver had failed to continue the air pressure in the tunnel at any time, and it had become flooded, an enormous claim for breach of contract would be made by the Rapid Transit Subway Construction Co., reducing possible dividends to creditors to a nominal figure, while rapid transit subway travel between the Boroughs of Brooklyn and New York would have been delayed for years. Any attempt of the Receiver to put upon the Rapid Transit Company the burden of completing the contract would have resulted in a claim for breach of contract, which would have wiped out any claim under the tunnel contract, and probably forced the other creditors of the bankrupt to share with the Rapid Transit Company in the remaining asset, the $87,000.00 plant, which was mortgaged to the Rapid Transit Company as security for the performance of the tunnel contract (Return, fol. 272); furthermore, if the tunnel had been turned over to the Rapid Transit Company the risk was great that the transfer might have resulted by some mishap in the flooding of the tunnel (Return, fols. 241-243, p. 81), which would have made it necessary to reconstruct it *ab initio*.

The difficulties of the situation were accentuated by the lack of funds necessary to carry on the work, amounting to some $100,000.00 per month (Return, fol. 240, p. 80), the actual sum required to complete it, being $819,908.83 (Return, fol. 330, p. 110). It is apparent that it would have been practically impossible for the Receiver to secure funds in so large an amount for such an enterprise, except possibly from the Rapid Transit Company.

Under the foregoing circumstances, with great difficulty counsel for the Receiver and Trustee were able, with the consent of the creditors (Exhibit V, p. 152) to secure from the Rapid Transit Company the necessary funds *under contracts* which appear at pages 89 and 95 of the return, thereby insuring to the community the prompt and successful completion of a great public necessity, and preserving for the creditors a $2,000,000.00 claim against the Rapid Transit Company (Return, fol. 259, p. 87) as well as increasing the estate through profits earned by the Receiver and Trustee, estimated at $80,000.00 (Return, fol. 244, p. 82). This contract was duly approved by order of the Referee (Exhibit V) and to this order the present petitioner did not object nor did she take any steps to review the same.

The preservation of the estate thus accomplished is for the benefit of the tort creditors; for although they may not share in the bankruptcy proceedings with the contract creditors, they concede that the contract claims are in the neighborhood of $60,000.00 (see Petition for Writ, p. 19, fol. 55), well warranting the conclusion that through the bankruptcy proceedings, a fund will be realized sufficient to pay the contract creditors in full, and leave a surplus sufficient to satisfy all claims for tort which are well founded. Now, after the Rapid Transit Company has advanced $800,000.00, and the bankruptcy

proceedings have preserved these assets in which the tort creditors would eventually share, including the plant, valued at $87,000, which otherwise would have been taken by the Rapid Transit Subway Construction Company under its mortgage above referred to, while the tort creditors have lain by, the petitioners come before the Court urging that because the situation is now saved, the interests of the Rapid Transit Company and of the contract creditors may be disregarded, and the bankruptcy proceedings should be upset. While the work has been successfully completed, the accounts between the Trustee and the Rapid Transit Subway Construction Company have not been adjusted, and the claim of the Trustee for such work has not been allowed or paid. The Rapid Transit Subway Construction Company was not made a party to the petitioners' application to set aside the adjudication, although it is at the least a serious question whether its interests, by reason of its loan to the Trustee, will not be seriously prejudiced or even destroyed, if the application were granted.

The situation confronting the petitioning creditors was as follows: At the time of filing the petition in bankruptcy, the situation was critical and a receivership was necessary to protect the property for the benefit of all the creditors as against certain creditors who were threatening judgments and executions. Had the petitioning creditors asked for a Receiver in a State Court or a United States Court, the same parties who are now attempting to set aside the adjudication in bankruptcy would have been the first to file a petition in bankruptcy against the company on the ground of such receivership proceeding in order to control the estate. This would have rendered impossible the arrangement with the Rapid Transit Co., which alone has prevented the absolute destruction of the estate. At

that time, it had been decided by District Courts in the Second Circuit that a corporation engaged in building bridges (*In re* Niagara Contracting Co., 127 Fed., 782), and one engaged in building houses (*In re* Rutland Realty Co., 157 Fed., 296; *In re* Church Construction Co., 157 Fed., 298), were manufacturers under the bankruptcy act. In view of these very recent decisions, and of certain others, the petitioning creditors were advised by their counsel that New York Tunnel Company was subject to bankruptcy, and that it would be unsafe to move for a Receiver in the State or United States Circuit Courts and accordingly the petition in bankruptcy was filed.

FIRST POINT.

MANDAMUS WILL NOT LIE WHERE ITS PURPOSE IS TO PERFORM THE OFFICE OF APPEAL OR WRIT OF ERROR, EVEN IF NO APPEAL OR WRIT OF ERROR IS ALLOWED BY LAW.

In the case of the *American Construction Company vs. Jacksonville Railway*, 148 U. S., 372, the Court said, at page 379:

> "By the same statutes, this Court is empowered to issue writs of mandamus, 'in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States.' Act of September 24, 1789, C. 20, Sec. 13, 1 Stat. 81; Rev. Stat., Sec. 688.
>
> But a writ of mandamus cannot be used to perform the office of an appeal or writ of error, to review the judicial action of an inferior court. *Ex parte Whitney*, 13 Pet., 404; *Ex parte Schwab*, 98 U. S., 240; *Ex parte Perry*, 102 U. S., 183; *Ex parte Morgan*, 114 U. S.,

174. It does not, therefore, lie to review a final judgment or decree of the Circuit Court, sustaining a plea to the jurisdiction, even if no appeal or writ of error is given by law. *Ex parte Newman*, 14 Wall., 152; *Ex parte Baltimore & Ohio Railroad*, 108 U. S., 566; *In re Burdett*, 127 U. S., 771; *In re Pennsylvania Co.*, 137 U. S., 451, 453.

Least of all, can a writ of mandamus be granted to review a ruling or interlocutory order made in the progress of a cause: for, as observed by Chief Justice Marshall, to do this 'would be a plain evasion of the provision of the Act of Congress that final judgments only should be brought before this Court for re-examination'; would 'introduce the supervising power of this Court into a cause while depending in an inferior court, and prematurely to decide it'; would allow an appeal or writ of error upon the same question to be 'repeated, to the great oppression of the parties'; and 'would subvert our whole system of jurisprudence.' "

See also

Ex parte Pollitz, 206 U. S., 323.
Ex parte Newman, 14 Wall., 152.
Ex parte Nebraska, 209 U. S., 436, and
In re Key, 189 U. S., 84,

In the Key case the Court said, at page 85:

"The writ of mandamus cannot be used to perform the office of an appeal or writ of error, and does not lie to review a final judgment or decree sustaining a plea to the jurisdiction, even if no appeal or writ of error is given by law. It is not granted in doubtful cases, or where there is another adequate remedy, and whether it shall go or not usually rests in the sound discretion of the Court. If sometimes demandable *ex debito justitiae*, it is certainly not on a record like this. *American Construction Company vs. Jacksonville Railway Company*, 148 U. S., 372, 379; *In re Rice, Petitioner*, 155 U. S., 396, 403; High on Extr. Remedies, 3d Ed., Sec. 9."

The above citations are especially pertinent when it is considered that the questions sought to be raised here have been passed upon by the District Court and by the Circuit Court of Appeals, and no appeal, writ of error or application for writ of certiorari has been sought in this Court for the purpose of reviewing the decisions of the lower Courts.

As a general proposition, mandamus will lie to compel an officer to do a ministerial act which a statute absolutely requires him to do without giving him the power to decide whether the given act shall be done or not in a particular case, but where such officer is given judicial powers to decide whether a certain state of facts exists or entitles a given person to certain relief, mandamus will not lie to control the decision of such officer. His acts can be corrected only by review had by appeal, writ of error or certiorari, as the case may be.

In her petition for writ of mandamus, the petitioner cites in support thereof the cases of *Ex parte* Bradley, 7 Wall, 364; Virginia vs. Rives, 100 U. S., 313; Virginia vs. Paul, 148 U. S., 107; Kentucky vs. Powers, 201 U. S., 1; *Ex parte* Wisner, 203 U. S., 449.

None of these cases, however, are pertinent or applicable to the case at bar. It appeared in each case that there was no remedy by appeal or writ of error, and the only process by which the lower Court could be kept within bounds was mandamus. The mandamus sought in each instance, furthermore, did not direct the lower Court or the Judge thereof to decide the matter in any particular way, nor did it call upon the lower Court to reverse any ruling made by it, nor did it attempt to control or review the judicial action of the lower Court in determining any matter before it. The writ as granted in these cases cited by the petitioner merely directed the Justice of the lower Court to

perform a ministerial act—to return to the proper Court cases which the Courts complained of had improperly attempted to control.

In each one of the cases cited jurisdiction depended upon a statute, and in each case it appeared that the statute in question did not give the Court any control over the person or the subject matter, and, therefore, the Court had no power to render any decision or make any order, in the cause, which would be valid.

Thus, in *Ex parte Wisner*, 203 U. S., a case involving jurisdiction dependent upon diversity of citizenship as defined the statute, it appeared that upon a motion to remand the cause to the State court made by one of the parties, it was claimed that the Circuit Court had no jurisdiction. The Circuit Court, however, refused to remand, and upon petition to this Court, mandamus was granted, the Court holding that it was apparent on the face of the record that the statute conferring jurisdiction did not give the Circuit Court jurisdiction of the subject matter of the suit or the person sued, and that there was nothing in the record to justify the Circuit Court in proceeding with the cause. The distinction between the Wisner case and the case at bar is in some respects well pointed out in *Ex parte* Pollitz, 206 U. S., 323, where the Court said (at page 331):

> "The issue on the motion to remand was whether such determination could be had without the presence of defendants other than the Wabash Railroad Company, and this was judicially determined by the Circuit Court to which the decision was by law committed.
>
> The application to this Court is for the issue of the writ of mandamus directing the Circuit Court to reverse its decision, although in its nature a judicial act and within the scope of its jurisdiction and discretion.

> But mandamus cannot be issued to compel the Court below to decide a matter before it in a particular way or to review its judicial action had in the exercise of legitimate jurisdiction, nor can the writ be used to perform the office of an appeal or writ of error."

In the Pollitz case the issue, as to whether the presence of defendants other than the Wabash Railroad Company were necessary to the determination of the question involved, was one which necessarily had to be passed upon by the lower Court, and so here the questions involved at the time of the adjudication and upon the later attacks upon the adjudication, were such as the lower Court, being vested with jurisdiction of the subject matter and of the alleged bankrupt, accordingly had jurisdiction to decide (see Third Point, *infra*, p. 24).

The opinion of the Court in *Ex parte* Wisner (*supra*) has been limited by later cases.

See

Ex parte Moore, 209 U. S., 490;
Western Loan Co. vs. Butte & Boston Mining Co., 210 U. S., 368.

In the case of *Kentucky vs. Powers*, 201 U. S., (*supra*), the prosecution of a criminal action was sought to be removed from the State Court of Kentucky to the Circuit Court of the United States. It appearing that the provisions of the revised statutes governing removal and jurisdiction did not justify the removal attempted, nor confer jurisdiction on the Circuit Court of the subject matter or the person, the Court by mandamus directed that the cause be remanded to the State Court.

The case of *Virginia vs. Paul*, presented an attempt to remove from the State court the prosecution of a criminal action. At the time of the filing of the petition for removal, the District Judge granted a writ of *habeas corpus* discharging the

prisoner from custody on the ground that the prisoner was in custody for an act done in pursuance of the law of the United States. On the question of mandamus the Court held that the Circuit Court of the United States had no jurisdiction, and said at pages 122-123:

> "The result is that the Circuit Court of the United States has, without authority of law, assumed jurisdiction of an indictment found in the courts of the State of Virginia for a crime against the laws of the State, and that the State is entitled to have the prosecution remanded to its courts to be there dealt with according to law. For aught that appears on this record, the State is not bound to commence or to carry on the prosecution in the courts of another government, but is entitled to resume its own rightful jurisdiction and authority, and to try the offender in its own courts. If the case should be allowed to proceed in the Circuit Court of the United States, and should finally result in an acquittal of the charge, in whole or in part, the State could not have a writ of error to review the judgment. United States vs. Sanges, 144 U. S., 310. A stronger case for issuing a writ of mandamus can hardly be imagined. The writ may be directed to the judge who has unlawfully assumed jurisdiction of the prosecution; and no previous motion to him to remand the case was necessary. The case is governed in every particular by Virginia vs. Rives, 100 U. S., 313, 316, 323, 324."

On the question of the propriety of the writ of *habeas corpus*, the Court said at pages 123-124:

> "But being, as appears by the records annexed to the petition for a mandamus, as well as by the return to the rule to show cause, an ordinary writ of *habeas corpus*, issued by the District Judge upon the ground that the prisoner was in custody for an act done in pursuance of a law of the United States, the question whether good cause was shown for his discharge

> was to be judicially determined by the judge, in the exercise of the jurisdiction vested in him by Sections 751-753 of the Revised Statutes. His determination might have been reviewed, on the facts as well as the law, by appeal. * * * But it cannot be reviewed or controlled by writ of mandamus."

The opinion of the Court on the question of reviewing the writ of *habeas corpus* by mandamus is directly applicable to the case at bar.

In the case of *Ex parte Bradley*, it appeared that the lower court had disbarred an attorney for a contempt committed before another court, and the Supreme Court of the United States found that the Court which had entered the order of disbarment had no jurisdiction to make such order, and, moreover, that no appeal from such order or writ of error to review the same was possible. The Court said, page 377:

> "The ground of our decision upon this branch of the case is, that the Court below had no jurisdiction to disbar the relator for a contempt committed before another Court. The contrary must be maintained before this order can be upheld and the writ of mandamus denied. No amount of judicial discretion of a Court can supply a defect or want of jurisdiction in the case. The subject-matter is not before it; the proceeding is *coram non judice* and void. Now, this want of jurisdiction of the inferior Court in a summary proceeding to remove an officer of the court, or disbar an attorney or counsellor, is one of the specific cases in which this writ is the appropriate remedy. We have already seen from the definition and office of it, that it is issued to the inferior courts 'to enforce the due exercise of those judicial or ministerial powers with which the crown or Legislature have invested them; and this, not only by restraining *their excesses*, but also by quickening their negligence and obviating their denial of justice.'"

It is thus apparent in the above cases cited by the counsel for petitioner that mandamus has not been granted to review the findings of a lower Court where that Court had jurisdiction of the subject matter and of the person, nor in any of these cases was the writ granted for the purpose of controlling or interfering with the judicial action of the lower Court. It was only issued in the cases referred to to compel the lower Court to remit the cases in question to the proper tribunal and to keep the lower Court from usurping the jurisdiction and authority of other Courts. A succinct statement of the law, showing when mandamus will or will not lie, is contained in the case of *Ex parte* Newman, 14 Wall., 152, where the Court said (at pp. 165-166):

> "Applications for a mandamus to a subordinate Court are warranted by the principles and usages of law in cases where the subordinate Court, having jurisdiction of a case, refuses to hear and decide the controversy, or where such a Court having heard the cause, refuses to render judgment or enter a decree in the case, but the principles and usages of law do not warrant the use of the writ to re-examine a judgment or decree of a subordinate Court in any case, nor will the writ be issued to direct what judgment or decree such a Court shall render in any pending case, nor will the writ be issued in any case if the party aggrieved may have a remedy by writ of error or appeal, as the only office of the writ when issued to a subordinate Court is to direct the performance of a ministerial act or to command the Court to act in a case where the Court has jurisdiction and refuses to act, but the supervisory Court will never prescribe what the decision of the subordinate Court shall be, nor will the supervisory Court interfere in any way to control the judgment or discretion of the subordinate Court in disposing of the controversy."

SECOND POINT.

INASMUCH AS AN ADJUDICATION OF BANKRUPTCY CANNOT BE ATTACKED COLLATERALLY, THE PETITIONER IS NOT ENTITLED TO HAVE THE ADJUDICATION SET ASIDE.

Chapman vs. Brewer, 114 U. S., 158 at 169;
Edelstein vs. U. S., 149 Fed., 636 (C. C. A., 8th Cir.);
In re American Brewing Co., 112 Fed., 752 (C. C. A., 7th Cir.);
In re Worsham, 142 Fed., 121 (C. C. A., 8th Cir.);
In re Columbia Real Estate Co., 101 Fed., 965 (D. Ct., Ind.).
In re First National Bank, 152 Fed., at p. 70.

The above cases are authority for the proposition that an adjudication in bankruptcy can no more be attacked collaterally than any other judgment.

In *Evers vs. Watson* (156 U. S., 527, at 533) the opinion reads:

> "But we do not wish to be understood as holding that, even if jurisdiction had not been apparent upon the record, advantage could be taken of it after a final decree, and in a collateral proceeding."

The Court should not entertain an attempt to attack collaterally the adjudication, for a Court would be reluctant to set aside an adjudication upon a motion especially for that purpose.

In re Penn., 4 Benedict, 99 (D. Ct., S. D. of N. Y.).

An analogous situation is found in suits instituted in the United States Courts, where the sole

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ground of jurisdiction is diversity of citizenship. A judgment entered in such a suit cannot be treated as a nullity or collaterally attacked on the ground that diversity of citizenship did not exist.

In cases where the record shows such diversity of citizenship.

> *Riverdale Mills vs. Manufacturing Co.*, 198 U. S., 188, esp. 197, 198.

In cases where the record does not show such diversity of citizenship.

> *Riverdale Mills vs. Manufacturing Co.* (*supra*).

And even in cases where the record shows that there is not diversity of citizenship.

> *Des Moines Navigation Co. vs. Iowa H. Co.*, 123 U. S., 552, esp. 558, 559.
>
> *Skillern's Executors vs. May's Executors*, 6 Cranch, 267;
>
> Approved in *Evers vs. Watson*, 156 U. S., 527, at 533, and in *Riverdale Mills vs. Manufacturing Co.*, 198 U. S., 188, at 197;
>
> *John Hancock M. L. Ins. Co. vs. Manning*, 7 Fed., 299 (Cir. Ct., S. D. of N. Y.).

It appears in the petition for the writ of mandamus (fols. 24-5) that the petitioner acquiesced in the review of the orders restraining the prosecution in the Supreme Court of the State of New York of the action by the petitioner Riggs, and inasmuch as the petitioner did lie by and await the result of that review she was bound thereby.

It appears in the return (at fols. 319-20) that counsel for the present petitioner, who was counsel for her in the Court below and in the United States Circuit Court of Appeals, appeared on the review of the order staying the Riggs suit, and obtained

an extension of twenty days, and then argued the review before the Circuit Court of Appeals. On both appeals to the Circuit Court of Appeals the present petitioner contested the propriety of the orders made by the District Court on the merits thereof and after the decree of adjudication had been entered. Therefore, we contend, on the authority of Western Loan & Savings Co. vs. Butte & Boston, etc., Co. (210 U. S., 368), that such appearance operated as a waiver to raise the question of jurisdiction.

It also appears in the return (at fols. 154-5) that the present petitioner, through her present counsel, made a motion directly attacking the jurisdiction of the District Court, and after a decision had been rendered denying the motion, took an appeal therefrom to the United States Circuit Court of Appeals, and it was only after the decision of that Court, affirming the decision of the District Court, had been rendered that the petitioner sought the assistance of this Court.

Furthermore, inasmuch as the petitioner on two occasions appeared in the District Court, first on a review from an interlocutory order staying the Riggs action in the State Court, and second on a motion directly attacking the adjudication, the petitioner is bound, as far as the present proceeding is concerned, by the ruling of the Circuit Court of Appeals. After submitting to the jurisdiction of the Circuit Court of Appeals to decide questions involved in the two appeals there taken, including the question of jurisdiction, it is now too late for the petitioner to come before this Court and ask that this Court direct the District Court to dismiss the petition. The two petitions to the Circuit Court of Appeals to review were filed in the bankruptcy proceedings, and thereby the petitioner submitted to the jurisdiction of the bankruptcy court.

Although the Circuit Court of Appeals in its second decision upholding the jurisdiction of the District Court (fols. 400, 401) held that the petitioner had no standing, it expressly decided the question of jurisdiction on the merits without relying in any way on the fact that the petitioner might be considered a stranger to the proceeding. The language is as follows:

> "It is objected by the contract creditors and by the trustee, among other things, that the Borne Scrymser Company has no standing because, having previously filed its claim in bankruptcy, it has acquiesced in the adjudication (*In re* Worsham, 142 F. R., 121) and that the tort claimants have no standing because their claims are not provable in bankruptcy (*In re* New York Tunnel Co., 159 F. R., 688). Although we think these objections are good, still if the appellants and petitioners have called our attention to a jurisdictional defect which makes the adjudication a nullity, we feel bound to consider it."

The writ now sought, if allowed, would be equivalent to directing the District Court, first to reverse its own ruling, and second to reverse the ruling of the Circuit Court of Appeals. This would in effect be granting a mandamus to compel a Court and the Judges thereof to decide a matter in a particular way. It has been repeatedly held that mandamus will not lie for such purpose.

See

In re Rice, 155 U. S., 396.
In re Morrison, 147 U. S., 14.
In re Pollitz 206 U. S., 323.
In re Burdett, 127 U. S., 771.

The present petitioner has now dragged this litigation along for two years and in that time has involved the bankrupt estate in considerable expense. She has sought relief in the lower Courts and has made no effort to go further than those Courts. The

Trustee has followed the rulings of the Circuit Court of Appeals and the District Court. After seeking a forum of her own choosing, it would seem grossly unjust if, after the lapse of two years, the entire proceedings should be quashed by mandamus at the instance of this petitioner. Such action, besides being wholly inequitable, would prevent the speedy and economical administration of bankrupt estates which the Bankruptcy Act was designed to accomplish.

THIRD POINT.

ORIGINAL JURISDICTION HAVING BEEN ACQUIRED BY THE DISTRICT COURT, MANDAMUS WILL NOT LIE.

The alleged lack of jurisdiction consists, it is claimed, in the allegations of the petition in bankruptcy that the New York Tunnel Company was engaged "in the business of building and contracting". Counsel for the petitioner has throughout the proceedings failed to distinguish between jurisdictional defects and defects in pleading. The jurisdiction of the bankruptcy courts is set forth in Section 2 of the Act. There is nothing in this section which intimates or provides what class of companies the District Courts should have jurisdiction over for the purpose of bankruptcy proceedings, nor does it provide that the District Courts should be without jurisdiction to entertain and decide proceedings instituted against any one class of persons or corporations, and the only limitation upon the jurisdiction of the Court as far as persons are concerned, is that the alleged bankrupt must have resided or had its principal place of business, for a period of six months preceding the filing of the petition, in the district over which that particular

District Court had jurisdiction. Sections 3 and 4 of the Bankruptcy Act provide as to what shall constitute a cause of action in bankruptcy, and briefly stated Section 3 provides that it must be alleged and proven, unless admitted, that the alleged bankrupt has done or committed an act which is an act of bankruptcy as defined by that section, and Section 4 declares what corporation shall be subject to decree or adjudication in bankruptcy, and so it must be shown that in a given case the alleged bankrupt is of the class defined in Section 4. To decide these questions the Court is necessarily given jurisdiction of the person and subject matter.

It has been held in a number of cases, which are cited below, that a failure to allege facts showing an act of bankruptcy within the provisions of Section 3, and also a failure to allege that the respondent or the bankrupt is such a person or corporation as may, within the provisions of Section 4, be declared a bankrupt, is not a jurisdictional defect but is merely a defect in the pleading which can be cured by amendment. In other words, the Court has jurisdiction of the person and the subject-matter and can exercise that jurisdiction to decide whether or not, upon the pleadings and proof, a given person or corporation has committed an act of bankruptcy, and whether such a corporation, if it has committed an act of bankruptcy, may be adjudged a bankrupt.

In the case at bar jurisdiction of the Tunnel Company was obtained by its appearance and consent to the adjudication.

Had the petition in bankruptcy alleged that the New York Tunnel Company was engaged "principally in manufacturing, trading, mining or mercantile pursuits", the petitioner would evidently not have complained that the Court had not jurisdiction of the proceedings. As a matter of proof, however, it

might appear that a company alleged to be one engaged in manufacturing, trading or mercantile pursuits was not, as a matter of fact, a company of that description. On the other hand, as a matter of proof, it might appear that a company alleged to be a building and construction company was in fact a company engaged in manufacturing, trading or mercantile pursuits. But in either event, no matter what the allegations in the petition were, the Court would have jurisdiction upon the filing of the petition, to decide the question as to whether or not the company was such a company as could be adjudged a bankrupt. Therefore if for the sake of argument alone we should admit that the petition in bankruptcy in the case at bar, was in any way defective, it is clear that such defects, if any, were those of pleading and did not oust the court of jurisdiction.

Defects in pleadings must be taken advantage of by demurrer or answer, but may be waived. Defects in pleadings however, do not oust the Court of jurisdiction.

See

Metropolitan R'way Receivership, 208 U. S., 90, at 108-109.

Hollins vs. Brierfield Coal & Iron Co., 150 U. S., 380.

In re Altonwood Park, 160 Fed., 448.

Inasmuch as the courts of bankruptcy in many cases act as courts of equity and are clothed with many powers of courts of equity, the language of the Court in the case of Hollins vs. Brierfield Coal & Iron Co. (150 U. S., at p. 380), is especially pertinent to the case at bar:

> "Defenses existing in equity suits may be waived, just as they may in law actions, and when waived, the cases stand as though the objection never existed. Given a suit in which

there is jurisdiction of the parties, in a matter within the general scope of the jurisdiction of courts of equity, and a decree rendered will be binding although it may be apparent that defenses existed which, if presented, would have resulted in a decree of dismissal. Take the present case as an illustration: Suppose the corporation and other defendants had made no defense, and, without expressly consenting, had made no objection to the appointment of a Receiver, and the subsequent distribution of the assets of the corporation among its creditors; it cannot be doubted that a final decree, providing for a settlement of the affairs of the corporation and a distribution among creditors could not have been challenged on the ground of a want of jurisdiction in the Court, and that notwithstanding it appeared upon the face of the bill that the plaintiffs were simple contract creditors; because the administration of the assets of an insolvent corporation is within the functions of a court of equity, and the parties being before the Court, it has power to proceed with such administration."

It is only parties to the bankruptcy proceedings, such as creditors or the alleged bankrupt, who can take advantage of the defects in pleadings, and then only by prompt and proper application. *See Section 18.* The creditors may, within the time prescribed by Section 18 of the Bankruptcy Act, take advantage of any defect in pleadings and be allowed to plead or answer. The petitioner before the Court in the present instance is not even a creditor within the meaning of the Bankruptcy Act.

See

In the Matter of New York Tunnel Company, 159 Fed., 688.

Columbia Real Estate Company, 112 Fed., 643.

In the Elmira Steel Company case (109 Fed., at page 479), the Referee held that the failure to al-

lege the business of the corporation deprived the District Court of jurisdiction. That case, however, is criticized by the Circuit Court of Appeals for the Eighth Circuit *In re* First National Bank of Belle Fourche (152 Fed., at page 70), and has not been cited with approval by any of the higher courts. It will be noticed also that, in the Elmira Steel Company case there was no allegation as to the business of the corporation of any kind, whereas in the petition of the New York Tunnel Company there was a distinct allegation of business, which was equivalent to the formal wording of the statute.

In a recent case in the District Court in the Western District of Kentucky, entitled *In re* Marion Contract and Construction Company (166 Fed., 618), it appeared that involuntary proceedings were instituted against a corporation on November 4, 1908, and the corporation consented to an immediate adjudication and the adjudication was had on November 5. No objection was made until January 20, when a bank which was a creditor of the corporation and whose president and vice-president were officers and directors of the alleged bankrupt, applied for leave to intervene and contest the adjudication. The ground upon which they sought to be made parties and have the proceedings set aside was that the petition in bankruptcy did not show that the bankrupt was a corporation principally engaged in manufacture. Their petition for leave to intervene and be made parties did not show that they were without knowledge of the pendency of the bankruptcy proceedings. The Court said (at pages 620-621):

> "Under a state of case such as now presented we think that both Netherland and the bank should have acted promptly, and their failure to do so makes it the plain duty of the Court to deny the application they now make. We think, both upon reason and the authorities:

1. That granting or denying the motion for leave to file the petition of these creditors at this late day and under all the facts stated is a matter entirely within the discretion of the Court.

2. That, instead of being an abuse of discretion to refuse to allow the petition to be filed, it would be a gross abuse of discretion to permit it.

3. That the bankruptcy courts can hardly be called courts of limited jurisdiction, inasmuch as they are vested exclusively with all jurisdiction in bankruptcy proceedings throughout the entire country.

4. That, even if, as we think is true, the petition in bankruptcy as amended in this case inadequately averred that the company was principally engaged in manufacturing as a basis upon which the adjudication was sought, the matter was not jurisdictional, but was one as to the sufficiency of the pleading to entitle the petitioning creditors to the relief they asked. The District Courts have jurisdiction of every proceeding seeking an adjudication in bankruptcy, whether or not the grounds for the judgment sought are well stated.

5. That as, under Section 25-a, an appeal from an order of adjudication in bankruptcy must be taken within 10 days thereafter, we must assume that the adjudication in this instance has become final, not only as against the parties named on the record, but as against creditors situated as Netherland and the bank are.

6. That Netherland and the Continental National Bank, having had full knowledge of the pendency of the petition of creditors before the adjudication, and having then omitted or declined to intervene under Section 18b, they must be held to have waived by their default all right to attack the adjudication, and

7. That this result should especially be enforced here, because from affidavits filed at the

> hearing it plainly appears that, if the objections now made had been made before the adjudication, they could probably have been entirely removed by a further amendment of the petition of the creditors, showing more fully and in detail the nature and extent of the business of the company, and that it was in fact principally engaged in manufacturing."

Upon the question of jurisdiction, this case is in accord with *In re* Altonwood Park, 160 Fed., 448, where the Court said, at page 449:

> "The Altonwood Park Company, a corporation organized under the laws of the State of New York, was adjudicated a bankrupt. The petitioner, a creditor, filed an application praying that the adjudication should be vacated because the corporation was not subject to be adjudicated a bankrupt. The District Court denied this petition, and the matter comes here for review.
>
> * * * * * *
>
> "The petitioner evidently thought that he was raising a jurisdictional question and endeavored to protect himself from acquiescing in the jurisdiction of the court. But the question was not one of jurisdiction at all. The District Court had jurisdiction of the parties and of the subject matter. It was for it to determine whether the business of the corporation was such as to bring it within that class of corporations subject to adjudication in bankruptcy. Its judgment was erroneous, but it had power to make it. Still we think the limited appearance—made upon a mistaken conception of the law—no ground for failing to grant the relief prayed for. The petitioner expressly submitted the substantial matter—the validity of the adjudication—to the determination of the Court. The decision upon this question in his favor would end the bankruptcy proceedings. If there are to be no further proceedings, it is immaterial that he be tried to keep out of them."

Another case of the same tenor is *National Bank vs. Klug*, 186 U. S., 202, where the Court said at pages 203-204:

> "Our jurisdiction of this appeal depends on the act of March 3, 1891, by the fifth section of which an appeal or writ of error from or to the Circuit or District Courts will lie directly 'in any case where the jurisdiction of the court is in issue,' and in such cases 'the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision.' In this case there is no such certificate, and, moreover, the District Court had and exercised jurisdiction. The conclusion was, it is true, that Klug could not be adjudged a bankrupt, but the Court had jurisdiction to so determine, and its jurisdiction over the subject-matter was not and could not be questioned. *Mueller vs. Nugent*, 184 U. S., 15; *Louisville Trust Company vs. Comingor*, 184 U. S., 25; *Smith vs. McKay*, 161 U. S., 355."

In the case at bar Circuit Court of Appeals said, in the course of its opinion (see fols. 402-3 of Return):

> "At the time the adjudication was made in this case building companies had been held in two districts of this circuit to be within the Act; *In re* Niagara Contracting Co., 127 F. R., 782; *In re* Rutland Realty Co., 157 F. R., 296; *In re* Church Construction Co., 157 F. R., 298. We have since decided, In the Matter of the Kingston Realty Co., 160 F. R., 447, that they are not subjects of adjudication. It is, moreover, argued in this case that a tunnel company differs from a building company and is within the Act. Lack of jurisdiction cannot be said to have appeared on the face of the record, and therefore the adjudication made by the District Court, even if erroneous, is not a nullity, as we have held in the Matter of Altonwood Park Co., 160 F. R., 448."

See also,

In re Urban & Suburban Realty Title Co., 132 Fed., 140;
In re Worsham, 142 Fed., 121;
In re Mason, 99 Fed., 256;
Roche vs. Fox. Fed. Cas., 11,974, 16 N. B. R., 461;
In re Plymouth Cordage Co., 135 Fed., 1,000;
In re Brett, 130 Fed., 981;
Loeser vs. Savings Deposit Bank & Trust Co., 163 Fed., 212;
Re First Natl. Bank, 152 Fed., 64.
Re Columbia Real Estate Co., 4 Am. B. R., 411.

In the Plymouth Cordage Co. case (135 Fed.), the Court said at page 1004:

> "The fact that there is no averment that the creditors are less than twelve cannot be more fatal to the right of the petitioner to an adjudication in bankruptcy than the fact that he has made such an averment, which, upon the trial, proves to be without foundation in fact. The truth is that the contention of counsel for the respondent fails to distinguish between the averments essential to jurisdiction over the subject-matter and the parties and those requisite to invoke a favorable adjudication upon the petition. Jurisdiction of the subject-matter and of the parties is the right to hear and determine the suit or proceeding in favor of or against the parties to it. The facts essential to invoke this jurisdiction differ materially from those essential to constitute a good cause of action for the relief sought. A defective petition in bankruptcy or an insufficient complaint at law, accompanied by proper service upon the defendants, gives jurisdiction to the Court to determine the questions it presents, althoug it may not contain averments which entitle the complainant to any relief, and it may be the duty

of the Court to determine either the question of its jurisdiction or the merits of the controversy against the petitioner or plaintiff. Allegations indispensable to a favorable adjudication or decree include all those requisite to state a complete cause of action, and they comprehend many that are not requisite to the jurisdiction of the suit or proceeding. The averment that all the creditors of Smith were less than twelve was not of the former, but of the latter class. It was not essential to invoke the jurisdiction of the Court over the parties to the proceeding and the property it involved, because the Act of Congress gave that Court, upon the filing of the petition of the creditor, jurisdiction to hear and determine the questions it presented, whether they were questions of jurisdiction or upon the merits."

And also at page 1003:

"The rule in bankruptcy declares that 'the Court may allow amendments to the petition and schedules on application of the petitioner.' Neither the act of Congress nor the rule in bankruptcy excepts jurisdictional averments from the power of the Court to permit amendments, and the established rule is that jurisdictional as well as other averments may be inserted or reformed by amendment. Whalen vs. Gordon, 37 C. C. A., 70, 73, 95 Fed., 305, 308; Bowden vs. Burnham, 8 C. C. A., 248, 59 Fed., 752; Carnegie, Phipps & Co. vs. Hulbert, 16 C. C. A., 498, 70 Fed., 209."

In Roche vs. Fox, Fed. Cas. No. 11,974, cited *In Re* Brett, 130 Fed., 981, a motion to dismiss a petition in bankruptcy was made for want of jurisdiction, because the petition was not signed and verified by a sufficient number of creditors, and for other reasons that need not now be mentioned. In the opinion on the motion, the following language was used:

"It is claimed that the Court has not jurisdiction. Jurisdiction of what? The law gives

> the Court jurisdiction of the subject matter before any petition is filed. And the filing of the petition, the service of process, and the appearance of the alleged bankrupt in the cause are ample to give jurisdiction of the person. What question of jurisdiction remains? In a certain sense, it is true, the Court has not jurisdiction. It cannot proceed to furnish the relief prayed for upon a petition which is demurrable in not containing all the necessary allegations. And the true force of the objections, to my mind, does not go to the jurisdiction of the Court, but only to the sufficiency of the petition as a pleading. The petition in bankruptcy answers to the declaration or complaint in an action at common law or bill of complaint in equity. Its office is to set forth the cause of action. It was never yet held that a complaint in an action at law or suit in equity should be dismissed for want of jurisdiction in the Court when suit has been commenced by service of process, and an attempt made to set out the cause of action, but the complaint is defective in some particulars, in not containing all the essential allegations to make a good case. Such defect would be good ground for demurrer, which, if sustained, leave would be given to amend, which, of course, could not be done if the Court had not jurisdiction."

The case of *In re* Stein, 130 Fed., 377, cited by the petitioner, was a District Court decision, has been criticized and not followed in later case of *In re* Plymouth Cordage Co., 135 Fed. (C. C. A.), p. 1005.

It is, therefore, apparent that, if the petition in bankruptcy is defective, which is not admitted (see Point VIII, *infra*, p. 53), the petitioners who filed the same would be entitled to amend their petition. In this view of the case the petitioner is before the Court, asking that the petition in bankruptcy be dismissed forthwith, without allowing the petitioners leave to amend. By making a direction in conformity

with this prayer, the Supreme Court would be taking away from the District Court and the Circuit Court of Appeals the right to exercise their discretion in allowing or refusing the right to amend, and would further, as previously pointed out, be directing the District Court to decide the question in a particular way. This is not the function of mandamus.

The application made by the petitioner for leave to intervene and plead is, it may be observed, wholly inconsistent with her position that the Court is without jurisdiction of the subject matter and of the bankrupt.

It is apparent that if the petitioner in the present proceeding contends that she is a creditor within the meaning of the Bankruptcy Act, she has shown no right to set aside the adjudication.

Section 18 of the Bankruptcy Act reads:

> "A bankrupt or any creditor may appear and plead to the petition within five days after the return day or within such further time as the Court may allow."

If, therefore, the petitioner was a creditor, her application to set aside the adjudication or for leave to intervene and plead was one addressed to the discretion of the Court, inasmuch as under the provisions of the foregoing section it is apparent that, on April 23, 1908, the time the motion was made to set aside the adjudication or for leave to intervene and plead, she was already in default.

In the Court below the petitioner associated with herself certain so-called "contract creditors", evidently seeking thereby to give a semblance of right to the application to intervene or set aside the adjudication, but even these creditors at that time were in default, and, furthermore, the District Court found that D. Allen's Sons Rope Company, one of the alleged creditors, had in fact sold its claim, and was

no longer a creditor, and that Borne Scrymser Co., the other alleged creditor, had in fact submitted to the jurisdiction of the Court, filed its proof of claim and acquiesced in the adjudication (see Return, fols. 321-7 & 345). Granting, however, that these so-called creditors at the time of the application had not submitted to the jurisdiction of the District Court, they were likewise in default, and any motion on their behalf for leave to intervene and plead or set aside the adjudication was within the discretion of the Court. The exercise of such discretion cannot, however, be reviewed by mandamus.

On the motion to set aside the adjudication, affidavits were filed by both parties, in which the nature of the business being transacted by the New York Tunnel Company was described at length. Upon these motion papers the petitioner submitted to the jurisdiction of the District Court to decide whether or not the adjudication had properly been made and could be sustained, and the District Court and the Circuit Court of Appeals found that the adjudication was proper and should not be disturbed. In this state of the record there can be no review of the findings of the lower Courts by mandamus.

See

Ex parte Newman, 14 Wall., 152.
Ex parte Rice, 155 U. S., 396.
American Construction Co. vs. Jacksonville Rway., 148 U. S., 379.
In re Key, 189 U. S., 84.
In re Parsons, 150 U. S., 150.
Ex parte Nebraska, 209 U. S., 440.

If the application for a writ of mandamus be construed as asking for a writ to compel the District Court to re-decide the motion to set aside the adjudication or to compel the Court to grant a motion, the application for the writ should be clearly denied

on the authority of the case of *Ex parte* Pollitz, 206 U. S., 330.

In re Parsons, 150 U. S., 150, the Court said, at page 156:

> "We cannot by writ of mandamus compel the Court below to decide a matter before it in a particular way, nor can we, through the instrumentality of that writ, review its judicial action had in the exercise of legitimate jurisdiction. *Ex parte* Flippin, 94 U. S., 348; *Ex parte* Burtis, 103 U. S., 238; *In re* Morrison, 147 U. S., 14, 26; *In re* Hawkins, Petitioner, 147 U. S., 486, 490; American Construction Co. vs. Jacksonville, Tampa, &c., Railway Co., 148 U. S., 372, 379, 386; *In re* Humes, Petitioner, 149 U. S., 192."

In American Construction Co. vs. Jacksonville, &c., Ry. Co., 148 U. S., 372, the Court said, at page 379:

> "But a writ of mandamus cannot be used to perform the office of an appeal or writ of error, to review the judicial action of an inferior court. *Ex parte* Whitney, 13 Pet., 404; *Ex parte* Schwab, 98 U. S., 240; *Ex parte* Perry, 102 U. S., 183; *Ex parte* Morgan, 114 U. S., 174. It does not, therefore, lie to review a final judgment or decree of the Circuit Court, sustaining a plea to the jurisdiction, even if no appeal or writ of error is given by law. *Ex parte* Newman, 14 Wall., 152; *Ex parte* Baltimore & Ohio Railroad, 108 U. S., 566; *In re* Burdett, 127 U. S., 771; *In re* Pennsylvania Co., 137 U. S., 451, 453."

In re Pollitz, 206 U. S., 323, the Court said, at page 331:

> "But mandamus cannot be issued to compel the Court below to decide a matter before it in a particular way or to review its judicial action had in the exercise of legitimate jurisdiction, nor can the writ be used to perform the office of an appeal or writ of error."

FOURTH POINT.

THE PETITIONER'S APPLICATION FOR LEAVE TO INTERVENE AND PLEAD OR TO SET ASIDE THE ADJUDICATION WAS ADDRESSED TO THE DISCRETION OF THE COURT, AND THE EXERCISE OF THIS DISCRETION WILL NOT BE DISTURBED BY MANDAMUS.

When the District Court, through Judge Holt's order, directed that the present petitioner liquidate her claim before a Special Master, and as liquidated file proof thereof with the Referee, not satisfied with that ruling, and although the Trustee did not make any opposition to her so proving her claim, she sought a review in the United States Circuit Court of Appeals, and as a result of that review that Court held that the petitioner's claim, being for unliquidated damages founded upon tort was not a provable debt in bankruptcy. Since the opinion of the United States Circuit Court of Appeals was rendered, this petitioner has taken no steps to secure a review in this Court either by a writ of certiorari or any other appropriate proceeding on appeal, although the Circuit Court delivered its opinion on the 17th day of February, 1908, more than a year ago.

A copy of the opinion of the Circuit Court of Appeals above referred to is contained in the return filed by the respondents on the present motion at page 44, and is reported in 159 Fed., at page 688.

The aforesaid decision of the Circuit Court of Appeals is in accord with other decisions in bankruptcy, among which may be cited *In re Columbia Real Estate Company*, 112 Fed., 643, in which case the Court held that a creditor within the meaning

of the Bankruptcy Act was only such a creditor as had a provable debt.

Thus the present petitioner has upon application to the Bankruptcy Court obtained the leave which she desired, to wit, permission to proceed in the State Court, and she is bound by the relief which was afforded her at her own instance. As shown in the return, at folios 49 to 57, the proceedings to stay her suit in the State Court were instituted on the 31st day of May, 1907, and her petition to review the order staying such suit was filed on the 9th day of November, 1907 (fol. 102). Six months later, and on the 11th day of May, 1908, the tort creditors, among whom was this petitioner, determined to change their positions and ask for leave to come into the bankruptcy proceedings as parties, and be allowed to plead to the petition and have the adjudication either set aside or opened for their benefit.

In Point VI *ante*, p. 43, of this brief, we discuss the question of laches more fully, but suffice it to say at this time that the petitioner is estopped from asking to be heard as a creditor in the bankruptcy proceedings, or from asking to have them set aside. Litigants cannot shift their position in such cases, especially when the rights of others are affected by such a change of position.

In *Davis vs. Wakelee*, 156 U. S., 680, the Court said at page 689:

> "It may be laid down as a general proposition that where a party assumes a certain position in a legal proceeding and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position."

To grant the petitioner any relief in the present proceeding, would, in view of all the circumstances of the case, be directly opposed to the doctrine of this Court enunciated in the case of Brown vs. Lake

Superior Co. (134 U. S., 530), where the Court said (at page 534):

> "But were it conceded that the bill was defective; that a demurrer must have been sustained; and that the appellant, if it had so chosen to act in the first instance, could have defended its possession, and defeated the action, still the decree of the Circuit Court must be sustained. Whatever rights of objection and defence the appellant had, it lost by inaction and acquiescence. Obviously the proceedings had were with its consent. Immediately on filing the bill it entered its appearance, and the same day a Receiver was appointed, without objection on its part. It suffered the bills to be taken *pro confesso*. It permitted the Receiver to go on in the possession of these properties for nine months, transacting large business, entering into many contracts and assuming large obligations, without any intimation of a lack of authority or any objection to the proceedings. After a lapse of nine months, suddenly its policy changed—it contested where theretofore it had acquiesced. And this, not because of any restored solvency or purpose to resume business, but with the evident intent to prevent the equality among creditors which the existing equitable proceedings would secure, and to give preference to certain creditors. For clearly it was the thought of the president of the corporation, himself the owner of a large majority of its stock, whose management had wrought its financial ruin, that after the setting aside of the equitable proceedings the lien of the confessed judgments would attach, and thus those favored creditors would be preferred."

In the case at bar the petitioner, at her own request, was allowed to proceed in the State Court and liquidate her claim, and as a result of such proceeding she has obtained judgment for Thirty-eight thousand five hundred and eighty-seven dollars. Now, after the estate has been conserved through the protection and aid of the bankruptcy

court, the petitioner seeks to have the lien of her judgment attach to the property of the estate and thus favor and prefer a few creditors to the exclusion of others who, during the pendency of the bankruptcy proceedings, have been prevented, through no choice of their own, from reducing their claims to judgment and can only resort to the remedy of filing a proof of claim with the Referee, as provided by the Bankruptcy Act, and receiving in satisfaction of their demands, such dividends as may be declared.

Inasmuch, therefore, as the petitioner had no provable claim in bankruptcy and had sought another forum for the assertion of her rights, her application for leave to re-enter the bankruptcy court and to plead or set aside the adjudication in bankruptcy, was directed solely to the discretion of the Court, which cannot be made subject to review by a writ of mandamus.

That mandamus will not lie to review the exercise and judicial discretion is established by numerous authorities, among which are *Ex parte Railway Co.*, 101 U. S., 711; *Ex parte Taylor*, 14 How., 3; *In re Haberman Manfg. Co.*, 147 U. S., 525. In *Ex parte Railway Co.*, 101 U. S. (*supra*), the Court said, at page 720:

> "We recognize, in its fullest extent, the power of this Court, by *mandamus*, to enforce prompt compliance with its mandates, but is not consistent with the principles and usages of law that we should, in that summary mode, revise the action of inferior courts, as to any matters about which they must or may exercise judicial discretion. 'The writ has never been extended so far, nor ever used to control the discretion and judgment of an inferior court of record acting within the scope of its judicial authority.' *Ex parte Taylor*, 14 How., 3; *Ex parte Many*, *Id.*, 24; *United States vs. Lawrence*, 3 Dall.,

42; *Life and Fire Insurance Company of New York vs. Wilson's Heirs,* 8 Pet., 291; *Ex parte Hoyt,* 13 *Id.,* 279; *Ex parte Myra Clarke Whitney, Id.,* 404; *Ex parte Newman,* 14 Wall., 152."

FIFTH POINT.

THE PETITIONER'S REMEDY, IF ANY, IS BY WRIT OF ERROR OR CERTIORARI.

It may be contended by the petitioner that inasmuch as her application to intervene is directed solely to the discretion of the Court, the exercise of such discretion cannot be reviewed by certiorari or writ of error, and therefore that mandamus is her only recourse. We have seen that if her application was addressed to the discretion of the Court, the exercise of that discretion cannot be reviewed by mandamus. If that is so, then she has no right to mandamus. If, on the other hand, the petitioner claims intervention as of right, and that her application to intervene was not addressed to the discretion of the Court, her proper course was to petition for a writ of certiorari to this Court, or possibly apply to the District Court to certify the question of jurisdiction, under Section Five of the Act of March 3, 1891, or proceed by a writ of error, under Section Six of the same Act of 1891.

The jurisdiction of Appellate Courts in bankruptcy is contained in Sections 24 and 25 of the Bankruptcy Act.

SIXTH POINT.

THE REFUSAL OF THE LOWER COURTS TO SET ASIDE THE ADJUDICATION OR TO ALLOW THE PETITIONER LEAVE TO INTERVENE AND PLEAD WAS JUSTIFIED IN VIEW OF THE LACHES OF THE PETITIONER AND THE FACT THAT RIGHTS OF THIRD PARTIES HAD INTERVENED, WHICH WOULD HAVE BEEN INJURED OR DESTROYED BY ALLOWING THE PETITIONER THE RELIEF SOUGHT.

The adjudication in bankruptcy was entered on the 29th day of May, 1907 (see Return, p. 15) and although the counsel for the present petitioner had notice thereof on the 31st day of May, 1907 (Return, fol. 260), he delayed until May 11, 1908, almost a year afterwards, before he made an application to set aside the adjudication. Inasmuch as the petitioner could raise the question only by demurrer, if at all, the lower Court could not consider the application.

See

In re Urban & Suburban Real Estate Title Co., 132 Fed., 140, and cases cited in Third Point, *supra.*

It appeared in the record before the lower Court that over eighty-five creditors had filed their proof of claim, amounting to over $60,000 (Return, fol. 321), and, furthermore, that the year within which claims might be filed had expired.

There were, moreover, other circumstances which were material in disposing of the question of laches, and the Court was called upon to consider not only the question of the rights of the creditors who had proved their claims but also the situation arising

out of the contract made with the Rapid Transit Subway Construction Company, which contemplated the borrowing of over $800,000 (Return, fol. 330). Too much emphasis cannot be laid upon the situation existing at the time when this loan was arranged.

A tunnel under the East River which was to connect the subway systems of the Boroughs of Manhattan and Brooklyn was but partially completed. Millions of dollars were involved in its construction (Return, fol. 230). If the funds necessary, merely to maintain existing conditions, had not been obtained this tunnel would have been destroyed, and the completion of a great public work would have been delayed for years. This was due to the fact that at the stage of the operation reached when the Receiver was appointed, it was necessary to maintain an abnormal air pressure in the tunnel so as to prevent the influx of water (Return, fols. 241-2); this required funds for the employment of men and purchase of supplies (Return, fol. 240).

Furthermore, only by completing the tunnel could the Receiver have ensured more than nominal assets for payment of dividends to creditors. The only substantial assets of the estate consisted of a claim under the contract for building the tunnel and the plant and machinery of the bankrupt (Return, fol. 257), the latter item was mortgaged to the Rapid Transit Co. as security for the performance of the contract (Return, fol. 272). Obviously, if the Receiver as the successor of the bankrupt had failed to complete the tunnel, a large claim would have been made for breach of contract; such claim would have wiped out any claim of the bankrupt under the contract and would have attached to the plant, the only other asset of the estate, under the mortgage upon it. Such claim

would have been greatly increased, if the tunnel had been injured or destroyed by flooding or other mishap.

As a result of the loan of $800,000.00 the claim of the bankrupt against the Rapid Transit Company estimated at $2,000,000.00 (Return, fol. 259), has been increased by the profits earned by the bankruptcy estate of about $80,000.00 and the plant has been saved for creditors, and rapid transit subway travel between the Boroughs of Brooklyn and Manhattan is an assured fact. The petitioner concedes that the contract claims filed in bankruptcy are only $60,000.00 (see petition for writ, Return, fol. 55). Now they wish to upset the adjudication, after they have lain by and watched the outcome of the bankruptcy proceedings through which not merely have the assets of the estate been preserved, but a profit of $80,000.00 (Return, fols. 244-5) has been added to the estate, thus ensuring payment of such judgments as may be recovered upon the tort claims.

This obligation and this profit are in a way personal to the Trustee. If the adjudication were set aside the lender of such sum would risk the danger of its loss. Creditors might also lose such profit, for the New York Tunnel Company would not be saddled with an obligation which it had not incurred, nor could it claim a profit it had not earned.

That is to say: The contract under which such loan was made contemplated the possible eventual indebtedness of the Trustee to the lender after an account had been made up between them (Return, fols. 261-262). Until the account of the Trustee is made up it is uncertain whether the Trustee will be the debtor. Such a contract cannot be assigned.

Arkansas V. S. Co. vs. H. M. Co., 127 U. S., 379.

Furthermore, it is obvious that in carrying on an undertaking of this character and magnitude various complications must have occurred. The somewhat complicated contract for the storage and sale of the plant used in such work is an example (Return, fols. 264-265, pp. 88-89). Accidents must have occurred.

It would appear, that unless all claims made against the estate are satisfied before the bankruptcy proceeding is vacated, such claims will be destroyed on the discharge of the Trustee.

See

Thompson vs. Northern Pac. Ry. Co., 93 Fed., 384, at 387 (C. C. A. 9th Cir.).

McNulta vs. Lochridge, 141 U. S., 327, at 332.

Davis vs. Duncan, Receiver, 19 Fed., 477.

Am. Bonding & Tr. Co. vs. B & O. S. R. Co., 124 Fed., 866 (C. C. A. 6th Cir.). Petition for certiorari dismissed, 191 U. S., 575.

Metz vs. B. C. & P. R. R. Co., 58 N. Y., 61.

Union Tr. Co. vs. L. H. R. Co., 7 Fed., 513, 516.

Farmers' L. & T. Co. vs. Cent. R. of Iowa, 7 Fed., 537.

Western N. Y. & P. R. Co. vs. P. R. Co., 137 Fed., 343, at 368 (C. C. A. 3rd Cir.).

It appears, therefore, under the authority of the Altonwood Park case that such intervening rights had vested since the adjudication as would induce the Court not to disturb the bankruptcy proceeding.

Thus it was said in Penn Mutual Life Ins. Co. vs. Austin (168 U. S., 685, at 698):

> "In other words, where a court of equity finds that the position of the parties has so changed that equitable relief cannot be afforded with-

> out doing injustice, or that intervening rights of third persons may be destroyed or seriously impaired, it will not exert its equitable powers in order to save one from the consequences of his own neglect."

Thus *in re* First National Bank (152 Fed., 64, at 71 C. C. A.), on a similar motion to set aside an adjudication, a delay of two months was held to constitute laches where receivers had been appointed and the estate was being administered.

The record in the District Court and in the United States Circuit Court of Appeals, as well as the record before this Court, fail to show that any notice that application was to be made to set aside the adjudication had been given to third persons having intervening rights. Under these circumstances it would have been improper for the lower courts, and it would be improper here, we submit, for the Court to attempt to determine that the rights of third parties have not intervened or that, granting the existence of such rights, there would be no prejudice to them upon the setting aside of the adjudication, without first giving such parties an opportunity to be heard.

Before it should be held that the Rapid Transit Company has obtained no intervening rights, it should have an opportunity to be heard. It has an apparent interest and should not be put to the risk of losing that right through the action of the Court until it has an opportunity to submit proof and be heard.

If there is the barest possibility of the slightest prejudice to its rights, this Court should not take any action until the Rapid Transit Company is made a party to the application, and it seems probable that such rights will be more than prejudiced —destroyed, if the bankruptcy proceedings are vacated. For instance, under its contract in certain contingencies, not yet ascertained, it is entitled to

the issue of certificates of indebtedness. Such right would be destroyed if the bankruptcy proceedings were vacated.

It is obvious that if the adjudication is set aside the Trustee's appointment will thereupon be vacated also and the contract above mentioned will thus be indirectly set aside.

A Court will not vacate a contract, made with its sanction, between one of its officers and a third party unless notice of the application is first given to such third party.

Mooney vs. British Commercial Iife Ins. Co., 9 Abb Pr. N. S., 103.

In this case it was said very pertinently regarding the contracts made by a receiver with the sanction of the Court (9 Abb. Pr. N. S., 105):

> "I do not doubt that the Court has the power, since all contracts with its officers are made subject to its ratification—and in the present instance, the contract was expressly so made—to vacate the agreement and give another direction, if in its judgment that should be done, but to do that without notice, and without hearing the parties who have become interested in the subject by a contingent agreement (of re insurance), is so manifestly unfair, and is such a departure from well-settled practice, that I have no hesitation in saying that an order which has been thus made must be vacated as a matter of ordinary honesty, so that the company may be heard. If it shall be understood that parties dealing with the officers of the Court have no rights, not even the right to claim to be heard, the Court may find itself in a position of great embarrassment, for no one will deal with it upon such terms, and its sales will soon be conducted in the absence of purchasers."
>
> "It is, of course, familiar practice under proper circumstances to order a sale to be vacated, and property to be resold upon the application of the parties to a suit, or some of

them, and although the purchaser may suffer by it; but no one ever heard of any such thing being done without notice to the purchaser, and without making such indemnity to him as the Court should think justice demanded."

Under the present Bankruptcy Act, the practice appears to require notice to the purchaser when an application is made to set aside a sale made by the Trustee.

See

In re Shea, 11 Am. B. R., 207, at 208, 126 Fed., 153, at 154 (C. C. A., 1st Cir.).

Two reasons have been given to warrant the delay in making a motion to set aside the adjudication; (1) that petitioners were not interested until their claims were held not to be provable (Return, fols. 173 to 174); (2) that they expected to have the adjudication set aside on the first petition to review, filed in the U. S. Circuit Court of Appeals (Return, pp. 32 and 33).

As a matter of fact steps were not taken to attack the adjudication before the Circuit Court of Appeals until after October 15th, 1907. At that time almost six months had elapsed since the adjudication. By that time something like $400,000.00 must have been advanced to the Receiver and Trustee, since during ten months over $800,000.00 was so advanced, and during the Receivership lasting a month, more than $120,000.00 was advanced to the Receiver.

Furthermore, before any hearing on the motion of the Allen Co. was had, that company sold its claim and ceased to have any interest in the bankruptcy proceedings (Return, fol. 345).

Counsel for the petitioner was in error in his belief that he could attack collaterally the adjudication on the previous review before this Court. (*In re* Altonwood Park Co., 160 Fed., 448; 20 Am. B. R.

31.) It can hardly be claimed that the bankrupt and third persons rather than the petitioner should suffer by the mistake of their own counsel. Suppose petitioner's counsel had made four or five applications to the District Court, one immediately following the previous one, and such litigation with the ensuing reviews had stretched over a period of several years, before such counsel learned the right procedure for attacking the adjudication. How can it be claimed that such time should not be counted against him on the question of laches.

An analogous situation is developed in the case of a person who sues at law and after a considerable period of litigation is adjudged to have no remedy at law and then sues in equity. The time occupied in the litigation at law will be counted against ihm on the question of laches.

Thus in Varick vs. Edwards (1 Hoffman's Ch. (N. Y.) 382 at 417), it is said:

> "It is equally true, that where a party has resorted to an action at law, when his remedy was in this Court, or to this Court when his remedy was at law, he cannot be protected against the time lost by the wrong proceeding."

See, also, Willard vs. Wood (164 U. S., 502), where, although the claim in question had been the subject of litigation in other suits at law and in equity practically from the accrual of the alleged cause of action, the suit in equity was held to be barred by laches, reference being made to the analogy of the statute of limitations (164 U. S., 523):

> "The general rule in respect to limitations must also be borne in mind, that if a plaintiff mistakes his remedy, in the absence of any statutory provision saving his rights, or where, from any cause, a plaintiff becomes nonsuit or the action abates or is dimissed, and during the pendency of the action, the limitation runs, the remedy is barred."

SEVENTH POINT.

THE PETITIONER IS NOT ENTITLED TO A WRIT OF PROHIBITION.

The provisions for the issuance of a writ of prohibition are contained in Section 688 of the United States Revised Statutes, which reads as follows:

> "Sec. 688. The Supreme Court shall have power to issue writs of prohibition in the district courts, when proceeding as courts of admiralty and maritime jurisdiction; and writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States, or to persons holding office under the authority of the United States, where a State, or an ambassador, or other public minister, or a counsel or vice-counsel is a party."

There is no provision in this section for issuance of a writ of prohibition in a bankruptcy case, and it has been held in the case of *Ex parte* Christy (3 How., 292) that a writ of prohibition cannot be issued in such a case.

But aside from the question of this being a bankruptcy proceeding, the Courts have repeatedly held that a writ will not be granted upon the application of a stranger, nor will it be granted after judgment.

Ex parte Rice (155 U. S., 396).

In *Ex parte Rice* the Court said (at pp. 402-403):

> "Without discussing the various matters urged upon our attention by counsel for the petitioner, it is sufficient to say that we are of opinion that the leave asked for cannot be granted.
>
> 1. Where it appears that the Court whose action is sought to be prohibited has clearly no jurisdiction of the cause originally, or of some

collateral matter arising therein, a party who has objected to the jurisdiction at the outset and has no other remedy is entitled to a writ of prohibition as a matter of right. But where there is another legal remedy by appeal or otherwise, or where the question of the jurisdiction of the Court is doubtful, or depends on facts which are not made matter of record, or where the application is made by a stranger, the granting or refusal of the writ is discretionary. Nor is the granting of the writ obligatory where the case has gone to sentence, and the want of jurisdiction does not appear upon the face of the proceedings. Smith vs. Whitney, 116 U. S., 167, 173; *In re* Cooper, 143 U. S., 472, 495. Tested by these rules, we are clear that a proper case is not made for awarding the writ of prohibition. * * *

The Circuit Court has proceeded to judgment in the premises, and we cannot revise and reverse its decision by resort to this writ in the manner proposed, nor can we command it to adjudicate upon the rights of parties not before it, by directing it to cause securities which may have been deposited to be returned to their owners, and to restore the parties to their original positions. Still less can we direct the hearing of further argument, because counsel may consider that the opportunity for the expression of his views and the presentation of objections has not been as ample as in his opinion should have been afforded."

It appears that after the Circuit Court of Appeals refused to entertain the petition for review filed by the present petitioner, her counsel served a notice of motion for a renewal of her previous motion to set aside the adjudication and for leave to intervene and be allowed to plead, and the matter was referred by the respondent Holt to the respondent Hough, and after being so referred the counsel for the petitioner asked the respondent Hough to refer it back again to respondent Holt, and by letter addressed to petitioner's counsel on January 19, 1909, respondent Holt declined to hear

the matter, and so the motion was remitted to Judge Hough. Since that time counsel for the petitioner has not asked Judge Hough to hear the motion, nor requested him to fix a day for hearing. The motion has, moreover, never been withdrawn, and is consequently still undetermined in the District Court.

It has been held that this Court will not issue a writ of prohibition where a matter is in the course of litigation in the District Court, on due process.

In re Fasset, 142 U. S., 479.

EIGHTH POINT.

THE ADJUDICATION OF THE NEW YORK TUNNEL COMPANY AS A BANKRUPT WAS PROPER.

Notwithstanding the fact that the petition in bankruptcy alleged that the New York Tunnel Company, was engaged in building and contracting, the adjudication was proper. It has never been decided in this Court, and prior to the Kingston Realty Company case (160 Fed., 445), there had never been a decision in the Second Circuit, holding that a construction company was not within the provision of Section 4b of the Bankruptcy Act relating to corporations. At the time the petition in bankruptcy was filed and the adjudication was made in the case at bar the Kingston Realty Company case had not been decided by the Circuit Court of Appeals. Even in that case, however, distinction was made between the construction of houses upon one's own land and the construction of houses upon lands of another, and the Court said upon this point (at page 447):

> "If this corporation had been engaged in constructing houses upon other persons' lands in-

> stead of upon its own, there might be more ground for claiming that the statute applies."

This distinction, we believe, is a substantial one based upon the general purposes for which the bankruptcy statute was enacted as will be pointed out below.

Prior to the decision in the Kingston case it had been the established rule in the Second Circuit for thirty-five years that a person engaged in constructing or erecting structures on the real estate of others for a gross price was engaged in trading, mercantile pursuits and manufacturing, under the provisions of the Bankruptcy Act and the decisions so construing the Act did not appear to have been questioned in other Circuits prior to the Act of 1898.

This was decided in January, 1872, by the then District Judge, later Mr. Justice Blatchford, *in re* Garrison (Fed. Case No. 5254, 5 Benedict, 430, 7 Natl. Bank Reg., 287), in which the Court said:

> "He was a merchant or tradesman. His occupation was that of a stairbuilder. He bought lumber, nails and other necessary materials, and by the labor of workmen employed and paid by him for the purpose, wrought such materials into stairs, for persons who gave him order to *construct* such stairs, and received as compensation from such persons a gross price for the stairs delivered and completed. He was none the less a tradesman because he was, also, a manufacturer of the stairs, or because he did not resell the lumber and other materials in the same state in which he bought them, *or because he did not buy and sell completed stairs.* * * * His schedules show debts to the amount of over $7,000, nearly all of the amount contracted during the year 1868, and nearly all of it for lumber for his business."
>
> (The italics are ours.)

In a somewhat analogous case, the same Judge decided, in refusing a discharge, under the same

clause of the Act of 1867 (*in re* Odell, Fed. Case No. 10,426; 9 Benedict, 209, 17 Natl. Bank R., 73) as follows:

> "It is stated by the bankrupts that they kept horses on livery or boarded horses, that is, kept in their stables horses belonging to other persons, and fed such horses with hay, oats, feed and grain, buying such food and receiving pay for the food which such horses consumed. This was as much a sale of the food as if it had been sold to be taken away from the premises and consumed by the horses of other persons elsewhere. The only difference is that it was sold to be consumed on the premises by the horses of other persons. The purchaser of the food from the bankrupts paid for it—not indeed by the pound or measure, as the bankrupts bought it, but in the amount paid per month or per day for keeping the horses on livery. It would seem, too, that the bankrupts bought some of their horse-feed on credit, for among their debts is a debt of $200 to one Bowne, a dealer in horse-feed."

And in 1901, Judge Brown felt compelled on the authority of the latter case to make the following decision (*in re* Morton Boarding Stables, 108 Fed., 791, at 794):

> "The principal business of this corporation being evidently that of boarding horses for their customers, including the complete care of them, and also the care of wagons, harness, coaches, etc., I should have hesitated, if this were an original question, to consider this corporation as principally engaged in 'trading or commercial pursuits' within Section 4*b* of the Bankruptcy Act. * * * In the case of Odell, 17 N. B. R., 73, Fed. Cas. No. 10,426, in this district, Mr. Justice Blatchford construed the words 'merchant or tradesman' in the Act of 1867, as including livery stable keepers, considering that the purchase and supply of hay, oats, feed and grain (which are the

principal items in this business), and receiving pay therefor in the compensation paid for the board of horses, was equivalent to a sale of the food and constituted 'trading.' This is no doubt a somewhat liberal construction of the word 'trading'; *but as this was the established construction under the former act and has, so far as I know, never been dissented from, and as the business is in general so closely allied and analogous to trading or commercial pursuits, I think I should follow the former construction as the learned Referee has done,* and confirm his report, leaving to the contestants the burden of any review by appeal, should that be desired." (The italics are ours.)

In construing the Act of 1898 the courts should follow the rule that where Congress enacts legislation containing words or phrases which have been judicially construed under an earlier Act on the same subject, it is presumed to know of such construction and to have adopted the construction previously made of such words and phrases. This rule of construction is set forth in

The Devonshire, 13 Fed., 39, at 42.
United States vs. Hermanos y Compana, 209 U. S., 337, at 339.

Furthermore, where the construction of a statute made by subordinate courts has remained unquestioned for a number of years, the higher courts should not overrule such construction unless it is clearly erroneous.

Bate Refrigerating Co. vs. Sulzberger, 157 U. S., 1, at 33.
United States vs. Union Pacific Ry., 148 U. S., 562, at 572.
Munn vs. Wm. Gerst Brewing Co., 99 Fed., 939 (C. C. A. 6th Cir.).

Likewise Acts of Congress should be interpreted in view of the history and conditions bearing upon such enactment.

United States vs. Laws, 163 U. S., 258, at 262, 264.

Mobile & O. R. R. Co. vs. Tennessee, 153 U. S., 486, at 502.

Church of Holy Trinity vs. United States, 143 U. S., 457, at 463.

United States vs. Union Pac. R. R. Co., 91 U. S., 72, at 79.

Preston vs. Browder, 1 Wheat., 115, at 121.

In order, therefore, to determine the purpose of Congress, former legislation may be examined to enable a proper interpretation of a given Act.

See

Lawrence vs. Allen, 7 How., 785, at pp. 792-793.

The legislative intent prevails over the strict letters of the statute.

Oates vs. Natl. Bank, 100 U. S., 239, at 244.

Wheeler vs. McCormick, 8 Blatchf., 267, at 276.

Church of Holy Trinity vs. United States, 143 U. S., 457.

United States vs. Kirby, 7 Wall., 482.

We believe that the history of the bankruptcy Acts enacted by Congress shows that it was the intention of Congress to make subject to bankruptcy as far as possible, by the process of enumeration, all corporations engaged in business requiring purchases of supplies on credit, except public service corporations.

In the early days of English bankruptcy legislation traders were the only persons engaged in business requiring purchases on credit to any great extent. Until 1861, the English bankruptcy acts applied to traders only, and until 1849 only involuntary proceedings in bankruptcy could be instituted.

> Taft, J., in Leidigh Carriage Co. vs. Stengel, 95 Fed., 637, at 647.
> Vaughan Williams, J., in *Ex parte* Painter, L. R. (1895), 1 Q. B., 85, at 88.

The Federal Bankruptcy Act of 1800 was an involuntary law, applying only to traders, bankers, brokers, factors and underwriters.

> Taft, J., in Leidigh Carriage Co. vs. Stengel, 95 Fed., 637, at 647.

The Bankruptcy Act of 1841 (Act Aug. 19, 1841, Sec. 1) provided that practically all natural persons could become voluntary bankrupts. Involuntary bankruptcy was by this Act limited to proceedings against traders, brokers, factors and underwriters.

Under the Act of 1867, practically any person or corporation could become a bankrupt, either voluntary or involuntary. The historical development of bankruptcy legislation is evidenced in the provision making the suspension of payment of his commercial paper by a banker, merchant or trader an act of bankruptcy.

In the Bankruptcy Act of 1898, as amended, Congress receded somewhat from the step taken under the Act of 1867, making all corporations subject to bankruptcy, and limited the bankruptcy of corporations to (1) involuntary proceedings (2) against corporations "engaged principally in manufacturing, trading, printing, publishing, mining or mercantile pursuits" (Sec. 4 *b*), railroad companies

being probably the most notable class of corporations which were liable to bankruptcy under the act of 1867, and are not now subject to bankruptcy.

It is submitted that the history of bankruptcy legislation indicates a purpose at all times to protect the creditors of persons engaged in business of such a kind as to require purchases of supplies on credit to any large extent. In the early days of such legislation, traders were the only persons engaged in such a business. As the field of business broadened and developed, other classes were added, the field of involuntary bankruptcy being kept more narrow than the other. Congress seems to have determined that the field covered by the Act of 1867 was too wide. Hence the Act of 1898 is really the next stage in the widening of the field of bankruptcy after the Act of 1841.

Thus Judge TAFT said in Leidigh Carriage Co. vs. Stengel (95 Fed., 637, at 648, C. C. A., 6th Cir.):

> "This is merely an effort to limit the application of the involuntary feature to that class of corporations which would have come under the head of 'traders' at common law. National banks and State banks are not included, because it was properly assumed by Congress that the statutory provisions for winding up such corporations were usually so summary, complete and drastic that no additional safeguards against frauds were needed."

The purposes of the bankruptcy acts are stated in the same case as follows (95 Fed., 637, at 647):

> "The proper purposes of a bankruptcy act like the present are: First (and this was its original purpose), to enable creditors to protect themselves by summary process against the frauds of their debtors in evading the payment of debts; second, to distribute the assets of the debtor equally among his creditors; and, third, to relieve debtors from the burden

> of debts which, through business misfortunes and otherwise, they have incurred, and which they are unable to pay. * * * The reason why bankruptcy legislation was limited to traders for so many centuries was because it was considered that traders were the class having the greatest opportunity, and therefore most likely to commit the frauds which bankruptcy acts were passed to prevent."

It is therefore submitted that in determining whether a corporation is engaged in manufacturing, mining, trading or commercial pursuits, the purchase of supplies upon credit by the corporation is a far more important factor than the nature of the act which it performs or the property which it delivers for compensation in the course of its business.

Thus in the decisions of Mr. Justice Blatchford under the Act of 1867 previously cited, he lays emphasis on the fact that both the stairbuilder and the livery stable keeper purchased their supplies on credit (Brief, pp. 54-55).

In re N. Y. & N. J. Ice Lines (147 Fed., 214) is consistent with this view as the corporation was not a purchaser of supplies, while a company which purchases its ice is a trader.

> First Natl. Bank vs. Wyoming V. I. Co., 136 Fed., 466, 14 Am. B. R., 448 (D. Ct. Pa.).

The Kingston Realty case is also consistent. For a real estate company's purchases of real estate would, if not paid for in cash, be secured by mortgage.

The authorized principal business of New York Tunnel Company consisted of manufacturing, trading and mercantile pursuits under the Bankruptcy Act.

It must be conceded that the corporation was as much of a manufacturer as a person engaged in building houses for others.

In holding such an occupation to be manufacturing, Judge HOUGH said (*in re* Rutland Realty Co., 157 Fed., 296):

> "The point principally argued upon the demurrer, *i. e.*, whether the allegation that the Rutland Realty Company 'is engaged in the business and was incorporated for the purpose of building houses' brings the alleged bankrupt within the scope of the Act of 1898. * * * I understand the allegation of the petition to mean that the alleged bankrupt did not build its own house, but built or tried to build or intended to build, houses generally to be sold. The most philosophical definition of 'manufacture' known to me is the language of Justice Brown in Tidewater Oil Co. vs. U. S., 171 U. S., 216, viz.: that the word is now 'ordinarily used to denote an article upon the material of which labor has been expended to make the finished product'. It is hard to conceive of any human action more accurately corresponding to this description or definition than the building of a house; and one of the definitions of 'build' found in the Century Dictionary is to 'form by uniting materials into a regular structure'. Turning to the decisions, the Columbia Iron Works vs. National Lead Co., 11 Am. Bank Rep., 340 (6th Circuit), and *in re* Marine Construction & Dry Dock Co., 11 Am. Bank Rep., 640 (2d Circuit), certainly hold that ship-building is manufacture; while *in re* Niagara Contracting Co., 11 A. B. R., 643, distinctly holds that 'the construction of buildings and bridges' is within the Act.
>
> "Remembering the second canon of construction, *i. e.*, that the enumeration of corporations is to be strictly construed, I cannot but think that where a statute declares that all corporations shall be taxed except manufacturing corporations, that the word 'manufacturing' should be construed as strictly in favor of the tax as

> any one could desire the construction of the same word under the Act of 1898. Yet under a Pennsylvania Act of this nature, bridge building companies have been held to be manufacturing companies (Commonwealth vs. Pittsburg Bridge Co., 156 Pa., 507; Commonwealth vs. Keystone Bridge Co., 156 Pa., 500)."

To the same effect *in re* Church Const. Co., 157 Fed., 298.

A similar view has been adopted by the Circuit Court of Appeals for the Eighth Circuit.

> *In re* First National Bank, 152 Fed., 64; 18 Am. B. R., 265.

In this case the Court, speaking through SANBORN, C. J., says (152 Fed., 64, at 67; 18 Am. B. R., 265, at 268):

> "The pertinent averment of the petition for the adjudication was that the Widell Company 'is, and during all said time has been, engaged in the business of manufacturing concrete arches and bridges, manufacturing and dressing stone and selling the same, and railroad and ditch contracting.' The word 'manufacturing' is a generic term of broad significance, advisedly used by Congress to include many species of corporations, and its comprehensive meaning ought not to be whittled away by fine distinctions. Derivatively meaning making with the hand, its ordinary significance is producing a new article of use or ornament by the application of skill and labor to the raw materials of which it is composed. Pin makers, pen makers, shoe makers, furniture makers, lumber makers, steel makers, boot makers, rail makers, engine makers, cement makers, are undoubtedly engaged in manufacturing, and the cogency of the argument that a corporation which makes a pin is manufacturing, while one which makes a bridge is not, fails to appeal to our judgment with convincing force. The latter may make the cement or the steel it uses in its structure. If so, it is engaged in manu-

> facturing the cement or the steel, and, whether it makes them or not, it produces a new and useful article, a bridge, when by the application of skill and labor to the materials of which it is composed it constructs it.
>
> As usual in respect to every question which involves the construction or operation of the bankruptcy law, there is a conflict of authority * * *. But the more persuasive reasons and the weight of the decisions support the view, and our conclusion is, that a corporation principally engaged in constructing concrete arches and bridges and in dressing and selling stone is engaged in a manufacturing pursuit and subject to adjudication in bankruptcy upon an involuntary petition."

In the Western District of New York, it has been held that a corporation engaged in erecting bridges, although the materials were supplied by others, was a manufacturer under the Bankruptcy Act.

> *In re* Niagara Contracting Co., 127 Fed., 782.

The word "manufacturing" contemplates either the original source of the word to make by hand, or the modern process involving the use of machinery, often of great value, employment of laborers, purchase of raw materials, generally on credit, and the turning over of a completed product different from the articles which it had purchased.

> Tide Water Oil Co. vs. United States, 171 U. S., 210, at 216.

The record indicates that the modern meaning of the word exactly conforms to the principal business of New York Tunnel Company. It used equipment representing an investment of $400,000.00 (fol. 110), its pay rolls for labor amounted to from

$30,000.00 to $40,000.00 every two weeks (Return, fol. 240); its purchase of supplies largely on credit ran from $20,000.00 to $60,000.00 each month.

The nature of the processes carried on by the bankrupt, consisting of combining iron, steel, concrete and masonry to form a subsurface structure is indicated somewhat elaborately in the record. At the completion of such work, a completed structure would be turned over to the Rapid Transit Subway Construction Company (Return, pp. 75 *et seq.*). *It should be noticed that neither that Company nor the bankrupt owned the land upon which the structure was to be erected.* New York Tunnel Company was therefore in a position similar to a person who manufactures goods for a prospective purchaser, the process being carried on upon land furnished by such prospective purchaser, but not owned by him.

Even supposing that the work were no more than a construction business, yet this is recognized as a kind of manufacturing. "Construct" is defined by the Century Dictionary to mean to put together the parts * * * erect, built, frame, fabricate. "Manufacture" the same authority defines to make or fabricate as anything for use. That is "construct" is one of the special meanings included in the word "manufacture."

That emphasis on this question should be laid upon the purchase of the materials and their transformation in the hands of the corporation rather than the ultimate disposition of such material when transformed is indicated in White Mountain Paper Co. vs. Morse & Co. (127 Fed., 643), where it was held that a corporation was a manufacturer of paper although since its organization it had done practically nothing save start the erection of paper mills and by letting contracts had obtained the cutting of timber in four foot lengths. In holding the

corporation to be a manufacturer the Court said (127 Fed., 646):

> "Statutes of this general class are not construed in a literal or narrow way, but like customs legislation, they are held as addressing themselves to the general purpose for which they were enacted. This, in this case, is of a commercial, business character. Therefore, clearly, the expressions of the statute under consideration are to be looked at from that point of view."

The above case was followed by the U. S. Circuit Court of Appeals for the Second Circuit *in re* Marine Const. & Dry Dock Co. (130 Fed., 446).

The latter case also develops this view, in holding a corporation to be a manufacturer when its principal business was the building of boats.

To the same effect, Columbia Iron Works vs. Natl. Lead Co., 11 Am. B. R., 340, 148 Fed., 834 (C. C. A. 6th Cir.).

There are two cases which have been cited as opposed to this view.

> Butt vs. C. F. MacNichol Const. Co., 140 Fed., 840 (C. C. A. 4th Cir.).
>
> *In re* T. E. Hill Co., 148 Fed., 832 (C. C. A., 7th Cir.).

These cases involved corporations engaged in building bridges, concrete arches, etc., and the Court in holding such business not to be manufacturing said in the first of the above two cases that a contrary rule would require the holding that building houses is manufacturing.

Notwithstanding these decisions of the Fourth and Seventh Circuits respectively, above referred to, the lower Courts of the Second Circuit have held that both bridge building (*In re* Niagara Contracting Company, 127 Fed., 782) and building houses for others (*In re* Rutland Realty Co., 157 Fed.,

296) were manufacturing companies within the provisions of the Act, and these cases stood unreversed in the Second Circuit at the time adjudication was made.

Two months prior to the filing of the petition in bankruptcy against the New York Tunnel Company the Circuit Court of Appeals for the Eighth Circuit held, moreover, that a corporation engaged in the construction of bridges, concrete, arches, etc., was engaged in manufacturing within the meaning of the Act.

See

In re First National Bank, 152 Fed., 64.

There is a further consideration, however, which is important. It appeared in the Butt case (140 Fed., 840, at 842) that the bankrupt had no extensive plant or machinery, but merely a few portable tools. There was no evidence that it was a large purchaser of supplies on credit. The Hill case cites the Columbia Iron Works case as in accord while it is *contra* (148 Fed., 834).

It is therefore submitted that New York Tunnel Company was a manufacturer and trader, and engaged in mercantile pursuits under the Bankruptcy Act.

LAST POINT.

THE PETITION FOR A WRIT OF MANDAMUS OR FOR A WRIT OF PROHIBITION SHOULD BE IN ALL RESPECTS DENIED WITH COSTS.

Dated April 9th, 1909.

Respectfully submitted,

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